

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

ePLUS, INC.,
Plaintiff,
v.
LAWSON SOFTWARE, INC.,
Defendant.

: Civil Action
: No. 3:09CV620
: March 7, 2012

COMPLETE TRANSCRIPT OF CONFERENCE CALL
BEFORE THE HONORABLE ROBERT E. PAYNE
UNITED STATES DISTRICT JUDGE

APPEARANCES: (Via telephone)

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UNITED STATES DISTRICT COURT

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1 (The proceedings in this matter commenced at 3:30
2 PM.)

3 THE COURT: Hello. This is ePlus, Inc.
4 against Lawson Software, Inc., Civil No. 3:09CV620.

5 Starting with counsel for the plaintiff,
6 who's present?

7 MR. MERRITT: Craig Merritt for ePlus, Your
8 Honor.

9 MR. STRAPP: Michael Strapp for ePlus.

10 MS. ALBERT: Jennifer Albert for ePlus.

11 MR. CARR: Judge, this is Dabney Carr for
12 Lawson Software. And I'll have my co-counsel
13 introduce themselves.

14 MR. THOMASCH: Your Honor, in New York for
15 Lawson, this is Daniel Thomasch. With me is Josh
16 Krevitt and Richard Mark.

17 MR. DUSSEAUT: Good afternoon, Your Honor.
18 Chris Dusseault also on the line.

19 THE COURT: Good afternoon, gentlemen and
20 ladies.

21 This is set to begin on April the 2nd. Let's
22 deal with what you-all have in your letters here. I
23 have several things, too.

24 First, I have the letter here from Mr. Strapp
25 dated the 7th of March. He gave a copy of it that

1 says to "Counsel of Record." And the first item is
2 Mr. Hager and what his situation is.

3 Mr. Strapp, since you raised the point, go
4 right ahead. I've read the letter.

5 MR. STRAPP: Yes, Your Honor. I would like
6 Mr. Merritt to address the point with Mr. Hager.

7 THE COURT: That's fine. All right.

8 MR. MERRITT: Your Honor, good afternoon.

9 THE COURT: Good afternoon.

10 MR. MERRITT: The Hager situation is fairly
11 straightforward. You've read our letter. I won't
12 embellish that. He was Lawson's sole witness when you
13 took evidence in advance of issuing the injunction.
14 There are matters to which Mr. Hager could and we
15 believe should testify, not only on some timeline
16 issues and on the colorability issue, but certainly in
17 response to some fairly pointed instruction we
18 received from the Court along the way as to Your
19 Honor's interest in exactly how that record was laid
20 before the Court.

21 In January of 2012, Mr. Hager gave a
22 deposition when this hearing was previously scheduled
23 last year. At that time he was represented by the
24 Gibson, Dunn firm. It was stated that he would have
25 been present last year and he intended to be present

1 in person.

2 The parties, as you may recall, made some
3 prehearing exchanges and perhaps even submissions of
4 proposed deposition excerpts. And at the time Lawson
5 objected to deposition excerpts from Mr. Hager on the
6 ground that they intended to make him available in
7 person at the hearing, and it was, therefore,
8 unnecessary.

9 We understand that there's been a passage of
10 time. We started after the Federal Circuit rule
11 reaching out to Lawson's counsel to see if Mr. Hager
12 would still be available. They did not have a clear
13 answer for several weeks. We were recently advised
14 that Mr. Hager has now obtained separate counsel in
15 the person of Rick Witthoefft, who I know is
16 well-known to the Court. The last I have heard on
17 this from Mr. Witthoefft was an email midday today
18 saying that he's not able to report Mr. Hager's final
19 position on whether he will appear but believes we
20 would be wise to prepare for the hearing as if he
21 would not be present in person.

22 We understand, Your Honor, that you have
23 previously indicated a very strong desire to have
24 witnesses available in person to give their testimony
25 to be cross-examined and to provide answers to any

1 questions that the Court might have.

2 We certainly share that strong bias.

3 However, we don't have control over making Mr. Hager
4 appear, and if we're not able to, we're going to need
5 the Court's guidance and its permission to submit what
6 testimony we do have by other means, and we didn't
7 want to wait until the last minute to raise the issue.

8 THE COURT: Is Mr. Hager still an officer of
9 the company?

10 MR. MERRITT: No, sir. He's left Lawson's
11 employment.

12 THE COURT: All right.

13 MR. MERRITT: And I believe he had already
14 left Lawson's employment at the time he gave his
15 deposition in January of 2012, but I believe Mr.
16 Thomasch defended that deposition, and he can correct
17 me if that's wrong.

18 MR. STRAPP: Where is Mr. Hager now?

19 MR. THOMASCH: Your Honor, this is Mr.
20 Thomasch.

21 THE COURT: Excuse me a minute, Mr. Thomasch.
22 Where is Mr. Hager now?

23 MR. MERRITT: Your Honor, he is the CEO of
24 another company, we believe. We have seen its
25 website. We believe it's in the Minneapolis area, but

1 again, that's from memory, and I don't have that in
2 front of me.

3 THE COURT: All right.

4 All right. Mr. Thomasch. Excuse me.

5 MR. THOMASCH: Yes, sir, Your Honor. To
6 answer your last question, my understanding is that
7 Mr. Hager is at a company called Kroll Ontrack in
8 Minneapolis, Minnesota. His employment with Lawson
9 ended in December of 2011.

10 He was deposed in January of 2012. At the
11 time of that deposition he was not employed. He was
12 between jobs. At that time the contempt proceeding
13 was scheduled to go to trial in February of 2012, and
14 when asked whether he intended to attend trial at his
15 deposition in January of 2012, he said that that was
16 his current intention.

17 It's been more than a year since then. We
18 did always have a preference to have testimony live
19 and to bring our witnesses, and it is our intention to
20 bring those Lawson witnesses who we control whose
21 testimony will be relevant to the proceeding to court.
22 Whether they are to be called by us or whether they
23 are to be called by the plaintiff, we will bring them.

24 We don't have that luxury with Mr. Hager.
25 That is ultimately his determination. And as Mr.

1 Merritt informed you, he has separate counsel. And we
2 have the same information that Mr. Merritt has in
3 regard to whether that's going to occur.

4 Earlier we did object to using deposition
5 testimony of witnesses who were going to be present in
6 person. Obviously, if Mr. Hager, who is unavailable
7 to both parties, is not going to testify at trial, we
8 would withdraw objections that were made on the basis
9 of his availability. Obviously, there might be
10 objections to individual questions, but not to the use
11 of a deposition as a whole. We would not have a
12 problem. He was deposed for seven hours. He appeared
13 voluntarily after his employment had ended, and he was
14 questioned at great length on all issues relevant to
15 the contempt proceeding, and it may well be that the
16 parties, both of us, wind up using that testimony.

17 There is certainly testimony from Mr. Hager
18 that we affirmatively want to bring to the Court's
19 attention and we would want to use his deposition as
20 well if he doesn't appear live.

21 THE COURT: The letter here from Mr. Strapp
22 says, "Thus, we wish to confirm whether there is any
23 acceptable alternative for presenting evidence if Mr.
24 Hager refuses to appear."

25 Is that a way of asking whether he can be

1 deposed for purposes of having his testimony available
2 at trial what in the state court proceedings would be
3 called a de bene esse deposition? But, of course,
4 that procedure doesn't exist in the federal system by
5 that name or by any other name. Depositions are
6 depositions. But were you asking for another
7 deposition I guess is what I'm asking?

8 MR. MERRITT: Your Honor, we did consider
9 that as an option. We don't have, as Your Honor
10 knows, a true de bene esse procedure in federal
11 practice. There are some things that sort of approach
12 it obliquely. We assumed it would be within the
13 Court's discretion and oversight of these proceedings
14 to authorize it if we wanted to do it. It is fairly
15 time consuming and fairly late in the game, and much
16 of this has been covered.

17 One of the difficulties -- the two
18 difficulties we have are, one, there are questions of
19 demeanor that can never be captured in a deposition no
20 matter how artfully it's taken.

21 And, second, there are some materials that
22 were produced by Lawson as a result of the Court's
23 rulings on the waiver of the attorney-client privilege
24 that were not available when his deposition was taken
25 and he has not been confronted with them.

1 THE COURT: All right. So what do you want?
2 Another deposition or what? I just need to know what
3 to do and hear what their position is.

4 MR. MERRITT: Judge, would you give us until
5 tomorrow morning to determine whether we think that is
6 worth the candle and let you know if we are seeking
7 leave for that? Or in the alternative, if we can just
8 be allowed to rely on the record that's already been
9 developed?

10 THE COURT: I guess I'll hear from you at
11 some point in the morning on it.

12 What's your position on it, Mr. Thomasch?
13 Let's assume for the moment they want another
14 deposition. What is your position? Do you know?

15 MR. THOMASCH: Our position, Your Honor, is
16 it is unnecessary on the demeanor point. The
17 deposition was filmed, and so there is a video of the
18 deposition and not just a transcript, and I believe
19 that does a good job of capturing exactly what
20 Mr. Hager's demeanor was when he was answering
21 questions.

22 With regard to the privilege documents, I
23 know that in fact it was my apparently erroneous
24 allowance of Mr. Hager to be questioned on privilege
25 documents that served in part for Your Honor's ruling

1 that we waived the privilege because there are some
2 documents that had been produced before the deposition
3 that were used at the deposition in which Mr. Hager
4 says that we have to do this because the attorneys
5 tell us we have to do it, and we allowed that
6 questioning to explain what his state of mind was when
7 the changes were made. So those documents have been
8 the subject of questioning.

9 I don't know if there are any other specific
10 Hager documents. I'm not aware of any that are going
11 to be used as exhibits that were subsequently produced
12 that he hasn't been questioned on, but I think he has
13 been thoroughly questioned on the issues in the case,
14 and we would think at the moment there is no need
15 subject to any showing that may be made by plaintiff's
16 counsel.

17 THE COURT: You don't need him, in other
18 words?

19 MR. THOMASCH: We feel that we have testimony
20 on the matters that are at issue and we would want to
21 present that testimony through his existing
22 deposition, which was taken after he left the company
23 but in anticipation of the contempt proceeding.

24 THE COURT: All right.

25 MR. MERRITT: Your Honor, one possibility of

1 resolving this short of taking another deposition, I
2 do believe there is a small number of documents that
3 were produced after the Hager deposition that were in
4 the privilege category and were subject to the Court's
5 ruling.

6 If we could show those to Lawson, get a
7 stipulation that they are in fact Lawson business
8 records that were received, sent or seen by Mr. Hager,
9 and be permitted to place them in the record without
10 objection, then that might be sufficient to lay the
11 record we need to make in your court without going
12 through the deposition exercise again.

13 THE COURT: Well, that's something that
14 sounds to me like you-all need to talk about and see.
15 Let Mr. Thomasch make a decision based on the
16 documents that he has in front of him at the time
17 you're talking about it instead of trying to do it
18 over the phone.

19 MR. MERRITT: We will do that.

20 THE COURT: So I think that's the best way to
21 do it.

22 But why then don't I hear from you with a
23 final decision on all this on Monday morning at 11:30.
24 Can we do that?

25 MR. MERRITT: Yes, sir.

1 THE COURT: Is that satisfactory, Mr.
2 Thomasch, for you?

3 MR. THOMASCH: Yes, it is, Your Honor.

4 THE COURT: All right. That way it will give
5 you-all time to sort out where you stand on this
6 issue.

7 Borrowing a new deposition, I would think
8 that under the circumstances it would be appropriate
9 to allow the use of his testimony to the extent he's
10 been deposed about it, to the extent that the Federal
11 Rules of Civil Procedure allow it to be used in accord
12 with the proper law on that subject.

13 And I assume that's what you-all would prefer
14 to do. Is that correct from your standpoint? I mean,
15 you would prefer to do it if you can't get him here in
16 person.

17 MR. MERRITT: Yes, sir, that's correct.

18 THE COURT: And if you don't need another
19 deposition.

20 Mr. Thomasch, I assume that's what you would
21 propose to do if you decide you don't need another
22 deposition or if he can't be here in person; is that
23 right?

24 MR. THOMASCH: That is correct, Your Honor.
25 There may be some objections we maintain, but, as you

1 said, per the federal rules.

2 THE COURT: Yeah. That's what the rules are
3 for. We will deal with that when the time comes.

4 MR. THOMASCH: Yes.

5 THE COURT: All right. That takes care of
6 that situation. The second item in Mr. Strapp's
7 letter is the scope of the contempt proceeding.

8 Mr. Strapp, are you addressing that?

9 MR. STRAPP: Yes, Your Honor.

10 During a telephone conference between the
11 parties in the past few weeks, we learned that there
12 is a disagreement regarding potential witnesses that
13 we intend to call at the hearing and evidence that we
14 intend to present regarding Lawson's ongoing
15 infringement and ongoing violation of the injunction
16 by using the actual infringing systems. Not the
17 systems as modified with RQC, but the systems that
18 were found to infringe with RSS.

19 When we raised this issue on a call, Mr.
20 Thomasch indicated that Lawson's understanding was
21 that that evidence would be outside the scope of the
22 order that Your Honor entered on January 24 regarding
23 the order of proof for the contempt hearing. And we
24 took a look back at that order.

25 Our understanding of that order is that it

1 would definitely include evidence within the scope.
2 It would include evidence that goes to the issue of
3 whether or not Lawson is in violation of the order of
4 injunction. That comes from paragraph B on the first
5 page of the order. And that's docket 1002.

6 THE COURT: What's the case number? Give me
7 the case number. I want to look it up here.

8 MR. STRAPP: The case number is 3:09CV620.

9 THE COURT: You would think that would be
10 emblazoned upon my memory, but it isn't.

11 What's the docket number?

12 MR. STRAPP: 1002.

13 THE COURT: All right. And you were
14 referring to what paragraph?

15 MR. STRAPP: Page 1, paragraph B.

16 THE COURT: All right. I've read that.
17 Okay. Go ahead.

18 MR. STRAPP: Our understanding is that
19 Lawson's view of this order and the scope that Lawson
20 intends to place on the order comes from page 2 of the
21 order, paragraph E. And on page 2 of the order,
22 paragraph E, Your Honor set forth a structure for
23 proof on the point with respect to the two-part test
24 that is set out in the Federal Circuit's TiVo opinion
25 with the first part of the proof offerings being

1 directed to the issue of whether or not the modified
2 products are more than colorably different, and the
3 second part of the TiVo test and the proof offerings
4 being directed to the infringement issue.

5 While we agree and understand and intend to
6 present proof offerings on those two issues in the
7 order that Your Honor has set forth, we don't believe
8 that that in and of itself is a limitation on what
9 comes in at the actual contempt hearing. For
10 example --

11 THE COURT: All right. Well, let me hear
12 from Mr. Thomasch on this.

13 MR. THOMASCH: Your Honor, we are prepared to
14 try any case that you want tried. We have requested
15 that the Court bifurcate the TiVo portion of the
16 proceeding so that the first phase would be limited to
17 colorability. And it has been our concern that the
18 plaintiffs have attempted to blur the line between
19 infringement and colorability throughout this
20 proceeding. And in the conversation that Mr. Strapp
21 indicates that he had with me, I did not indicate that
22 we felt that this was entirely beyond the bounds of
23 the hearing as much as we didn't understand how it fit
24 into the order, and that we might need to jointly seek
25 guidance from the Court.

1 We do not believe, however, that the issue of
2 whether or not this issue that he's talking about
3 comes into colorability. I just want to stress what
4 Mr. Strapp is saying and the underlying evidence we
5 could not disagree with him more about, but what he is
6 arguing is that we are in contempt even if the RQC
7 redevelopment, the redesigned product, is more than
8 colorably different and is non-infringing, either or
9 both of those. He's saying, Nevertheless, you're
10 still in contempt because you did something with a
11 customer who downloaded RQC but may not have run RQC,
12 and that's the issue he now wants to say can be tried.

13 If Your Honor wants to hear evidence on that
14 case, we are more than happy to present it in the
15 multiple discussions that the parties have had about
16 what would proceed at the hearing. That has not been
17 the subject of discussion at all. And it caught me by
18 somewhat surprise that they were still pursuing those
19 allegations, but we have an answer to them. It's
20 compelling and we're prepared to present it, but we do
21 not want it to infiltrate the separate analysis of the
22 two-part TiVo case, the colorability and the
23 infringement analysis.

24 TiVo tells us how that's to be done. And the
25 issue of whether we're in contempt because the

1 redesign was a fraud, as they have alleged, is very,
2 very different from this new issue, which is whether
3 we're in contempt because we somehow continue to deal
4 with a customer who had downloaded the redesign but
5 they say didn't install it, and we say they're wrong.

6 MR. STRAPP: Your Honor, this is Mr. Strapp.
7 If the concern of Lawson is that these issues must be
8 segregated, in other words, the issue of whether
9 Lawson has continued to support its customer's use of
10 the original infringing systems, must be segregated
11 from the issue of whether or not RQC is a more than
12 colorable difference from RSS. We're entirely in
13 agreement that those two issues can and should be
14 segregated at the contempt hearing.

15 But one issue that I do want to correct I
16 think there might be a misperception about is that
17 this is a newly raised issue. This was a subject of
18 discovery at length preceding the contempt hearing
19 that was scheduled in February of 2012. There were
20 multiple depositions taken on this issue. There were
21 interrogatories exchanged and documents exchanged.

22 So this isn't a new issue that ePlus is
23 raising at the last minute but rather it's an issue
24 that's been at the forefront of both parties'
25 discovery efforts for several months.

1 THE COURT: Apart from your discovery
2 efforts, is it alleged in the petition seeking a
3 contempt?

4 MR. STRAPP: Well, Your Honor, at the time
5 that we submitted -- I don't have that petition in
6 front of me.

7 THE COURT: You've got a computer in front of
8 you, don't you?

9 MR. STRAPP: Right. At the time we submitted
10 that petition that was back in September of 2011, I
11 believe. And September 2011, our understanding based
12 on the representations that Lawson had publicly made
13 because we didn't yet have discovery regarding
14 contempt was that Lawson had made available to its
15 customers and its customers were actually downloading,
16 installing and implementing this new RQC module and
17 that the customers were no longer using the
18 adjudicated infringing systems.

19 When we asked in an interrogatory about which
20 customers had actually installed and implemented the
21 design-around RQC module, we were shocked and
22 surprised to learn that actually Lawson couldn't tell
23 us of a single customer who had installed and
24 implemented RQC because Lawson said it simply didn't
25 know. It just knew customers had downloaded RQC, but

1 that downloading RQC doesn't mean that a customer was
2 actually using RQC.

3 So we learned about that in discovery. And
4 we took quite a bit of discovery because, as you can
5 imagine, we were surprised and we thought, Well, if
6 Lawson is actually still supporting the use of the
7 original infringing systems, that couldn't be more
8 relevant to the issue of whether or not Lawson has
9 violated the actual terms of the injunction.

10 So that's been the subject of discovery. And
11 to the extent that we did allege that Lawson was in
12 violation of the injunction, obviously a violation of
13 the injunction would include the continuing and
14 ongoing maintenance and support and encouragement of
15 its customers' use of the original infringing systems.

16 MR. THOMASCH: Your Honor, if I might briefly
17 respond.

18 THE COURT: Yes, go ahead.

19 MR. THOMASCH: I just would like to clarify
20 that, one, as far as whether the issue is new or not,
21 there was discovery about it. That's not disputed.
22 What I meant to say is it has not been part of the
23 discussion as to what this hearing would be about at
24 all in my memory at any time. And we have repeatedly
25 requested that there actually be a petition that

1 alleged what it is that we're said to have done and
2 the basis for it for contempt. And we have not
3 received one with regard to this issue.

4 The only thing that there was was a motion
5 seeking permission, an order to show -- I'm sorry.
6 Seeking an order to show cause as to why we shouldn't
7 be held in contempt. But that related to the alleged
8 lack of a colorable difference between the old systems
9 and the redesign systems. And that's the case that we
10 expected to go to a hearing on on April 2 and which
11 we're ready. If Your Honor wants broader issues, we
12 will handle them.

13 The questions that came up at the deposition
14 were with regard to, in the abstract, the status of
15 customers who downloaded RQC. This is computer
16 software. So they downloaded it. But had they gone
17 the next step and installed it and were they running
18 it in production? And witnesses said, Well, we didn't
19 know about that.

20 What we also put out in interrogatories that
21 clarified that before any support was given to those
22 customers, their status was checked, and only
23 customers who were confirmed to have installed and
24 implemented RQC were eligible to get service during
25 the period in which the injunction was in effect

1 against them.

2 There could have been service of RSS
3 customers who were health care customers in the
4 six-month period where the injunction was not
5 implemented against them, but we've been very strict
6 in not providing service to anyone without having
7 confirmed that they had implemented RQC.

8 Indeed, after the depositions, we went back
9 and we rechecked with every customer and confirmed
10 that every customer is using RQC in its production
11 mode. And if that issue is to be tried, we will
12 supplement our discovery responses and we will bring
13 that evidence to court because it's simply a question
14 of what were we prohibited from doing. We were
15 prohibited from providing support to people who were
16 still using the old system, and we have not done that.
17 We have not violated the order at all. But that isn't
18 the issue that we thought the Court teed up in its
19 order of January 24.

20 MR. MERRITT: Judge Payne, this is Craig
21 Merritt. You had asked a question a moment ago about
22 ePlus's early papers on the contempt proceeding and
23 what was addressed in those. I've taken a quick look,
24 and if you're able to pull up docket No. 808, it's an
25 ePlus reply brief filed on September 23, 2011.

1 THE COURT: Just a minute. What is it?

2 MR. MERRITT: It's document 808.

3 THE COURT: There isn't any 808.

4 MR. MERRITT: It was filed September 23,
5 2011. Docket No. 808.

6 THE COURT: These docket numbers are out of
7 order. Okay. Okay. Where is it?

8 MR. MERRITT: In any event --

9 THE COURT: Where is it? What page?

10 MR. MERRITT: It's page 15.

11 THE COURT: Okay. Let me get there.

12 MR. MERRITT: Yes, sir.

13 THE COURT: All right.

14 MR. MERRITT: You'll see the heading "D," and
15 as early as September 23, 2011, ePlus had put in
16 contention its view that Lawson was continuing to
17 encourage its customers to keep using the infringing
18 systems that included RSS.

19 Now, I don't know --

20 THE COURT: Wait just a minute. I don't see
21 that entry on page 15.

22 MR. STRAPP: Your Honor, the page number at
23 the bottom of the page is 13.

24 MR. MERRITT: It's page 13. I'm sorry. I
25 was looking at the top at the Court's numbering. My

1 apologies.

2 THE COURT: Page 13. Okay.

3 MR. MERRITT: And you'll see the subtopic
4 heading "D."

5 THE COURT: "Defendant has violated the
6 injunction order by encouraging its customers to
7 continue using the infringing systems."

8 MR. MERRITT: And you had asked the question
9 if that issue had been put in play by ePlus's initial
10 papers. I did find it in the reply. I haven't had a
11 chance to look at the initial filing, but it's
12 certainly been in play in the case since September 23,
13 2011.

14 I can't speak to Mr. Thomasch's comment about
15 when that may have ceased because we haven't received
16 any updated discovery from Lawson on that, but at that
17 point it was certainly placed in issue by ePlus.

18 MR. THOMASCH: Craig, may I ask you because I
19 don't have that brief in front of me, does that
20 section that you're referring to have anything to do
21 with the download status versus the installation
22 status or is that predicated on the webinar from June
23 of 2011?

24 MR. MERRITT: At that point it was predicated
25 on the communications from Lawson to its customers

1 that they were not prohibited from continuing to use
2 the infringing software.

3 MR. THOMASCH: Okay. With all due respect,
4 that I would say, I would suggest, is not the issue
5 that was raised in connection with the allegations
6 made in the letter of today by Mr. Strapp, which
7 relate to whether when customers were encouraged to
8 transfer over to RQC, the first step in that process
9 is to download RQC, and it is only after that that you
10 install it and uninstall RSS. It related to that.

11 I think that you are inadvertently moving to
12 something that sounds like but is actually
13 fundamentally different from what we're talking about.

14 THE COURT: All right, gentlemen and ladies,
15 this: I did not intend in any way to limit paragraph
16 B of the order of January the 24th by the terms of
17 paragraph E setting forth the order of proofs on the
18 TiVo issue. E was designed to deal with the
19 colorability and infringing allocation and to the
20 parts of your letters which had extensively addressed
21 how that ought to be done. E doesn't limit that which
22 is permitted by B.

23 B permits a hearing on whether Lawson at any
24 time after May 23, 2011, was in violation of the order
25 entered into on that date, except you don't have the

1 prohibitions that are precluded or excluded from that
2 reach of that provision.

3 Now, in my judgment, you have to go look at
4 the petition for an order to show cause and the
5 materials submitted in connection therewith in order
6 to identify the issues on which the contempt hearing
7 is going to be had as to whether or not conduct
8 constitutes contempt or not because that's what's
9 framed the question.

10 I have no idea whether there have been
11 pleadings that have amended the original petition.
12 And I can't look at it now and don't know. But one
13 way or the other, you-all can sort all that out.

14 However, I do believe that evidence
15 respecting the state of mind of Lawson is something
16 that can be considered, and evidence of the type
17 you're talking about may be probative on that topic
18 even if it's not the predicate for a finding of
19 contempt, if you understand the distinction I'm
20 drawing. Do you?

21 MR. MERRITT: Yes, sir.

22 THE COURT: All right. So I think you-all
23 have some homework to do, both of you, to sort that
24 out.

25 And I agree with Mr. Thomasch that I want to

1 hear the things dealt with in E1 and E2 in that order
2 and discretely because then I've got a record
3 altogether at one place in which to make findings.
4 And I don't know that this kind of information is
5 helpful even if it's a predicate for contempt as
6 opposed to an evidence of state of mind or evidence of
7 contemptuous conduct of some kind.

8 I hope it can be presented. I'd like to have
9 it presented separately. And I hear Mr. Strapp and
10 Mr. Thomasch basically saying that that's a good idea,
11 and I do, too.

12 MR. MERRITT: Judge Payne, may I ask a
13 question by way of clarification?

14 THE COURT: I always get in trouble when you
15 do that.

16 MR. MERRITT: To use the simplest example I
17 can think of, let's take someone like Dr. Weaver, who
18 is an expert who will, I believe, be addressing both
19 colorability and infringement.

20 Does the Court anticipate that we would call
21 him once to deal with colorability, and then there
22 will be some sort of a gatekeeping process by the
23 Court, and then we'll be asked to call him a second
24 time?

25 THE COURT: There won't be any gatekeeping in

1 the sense of dealing with any issue. It's just I want
2 it all to be in one place at one time so that I
3 understand what you-all, each of you, think is the
4 evidence on the colorability question and the evidence
5 of the infringement question. I think it may be you
6 have to call them back in order to do that, but I
7 don't envision any decisional process between the two.

8 MR. MERRITT: That's what we were trying to
9 figure out because, as a practical matter, just
10 putting a witness on, there are a couple ways to do
11 it. We can call the witness twice or, since this is a
12 bench proceeding, we can say, Your Honor, we're going
13 to ask Dr. Weaver about the colorability issue. And
14 then when that's concluded, simply highlight that
15 we're moving on to another issue. We just want to be
16 sure that we present the proof in the way you would
17 like to see us do it.

18 THE COURT: I do understand that mode of
19 proof, but I think in this in instance, it's going to
20 be easier to call them back. And the same thing for
21 you. And in fact, gentlemen, just a minute, and
22 ladies, excuse me. I need to get my copy of my order.

23 Yes. The order provides, this is what I
24 thought, that all of the evidence on colorability from
25 both sides, opening, response and reply, will come in

1 as what's called the first offering, and then the
2 second offering, all of the evidence from each side
3 will come in on that issue. That's what the meaning
4 of E3 is.

5 MR. THOMASCH: Understood, Your Honor.

6 THE COURT: And we can put in the evidence of
7 the other -- if other infringing conduct has been
8 charged and discovered, then it can be considered as
9 other infringing conduct.

10 If it comes in as evidence of a state of mind
11 or for some other purpose, it can be presented apart
12 from these two locations, but it will be considered,
13 assuming that it's pertinent.

14 All right. Are those the two things that
15 were in your letter, I believe?

16 MR. STRAPP: Yes, Your Honor.

17 THE COURT: All right. Now, is there
18 anything else that you folks want to take up?

19 MR. MERRITT: Not from the ePlus side.

20 MR. THOMASCH: There is one item from
21 Lawson's side.

22 THE COURT: What's that, sir?

23 MR. THOMASCH: And that is, Your Honor,
24 briefly, we're in an unusual situation now as the case
25 has been brought down to the changes relevant with

1 respect to Claim 26 where we have identified two
2 changes. What the changes are are not in dispute at
3 all. The functional effect of the changes is not in
4 dispute.

5 What's in dispute is the significance of
6 those changes from not significant at all to case
7 dispositive, prove our point. And that issue,
8 frankly, depends largely on what was the basis for
9 claiming that Claim 26 was infringed at the first
10 trial.

11 The only place where the real colorability
12 evidence is addressed, and our arguments are addressed
13 in ePlus's submission on contempt, is at page 16 of
14 their submission. In the last paragraph, they allege
15 what they did not rely on. They say twice, We did not
16 rely on certain evidence to prove infringement of
17 Claim 26.

18 They do not say what they did rely on to
19 prove infringement of Claim 26. And we would contend
20 that we have shown what they relied on and that's why
21 our changes are very significant.

22 THE COURT: What submissions are you speaking
23 of?

24 MR. THOMASCH: Your Honor, in the order that
25 we've been discussing of January 24, 2013, docket

1 1002, you called for submissions on page 2, paragraph
2 F. You asked for a submission from ePlus that was
3 made on February 11. And it is that submission on
4 page 16 --

5 THE COURT: What's the docket number of that?

6 MR. THOMASCH: I do not have, I'm sorry, Your
7 Honor, the docket number of ePlus's submission of that
8 date.

9 THE COURT: What date was it submitted?

10 MR. THOMASCH: It was submitted on
11 February 11 of 2013. It's called, "Plaintiff ePlus,
12 Inc.'s Prehearing Statement Of Position On Contempt."

13 THE COURT: That would be 1008?

14 MR. THOMASCH: That sounds approximately
15 right.

16 THE COURT: Well, it's sealed so I can't see
17 it. You-all have put it in secret, so I can't see it.

18 MR. THOMASCH: Your Honor, I just would read
19 one of the two sentences to Your Honor that says,
20 "ePlus did not rely upon the capability of including
21 items from a punchout catalog on the same requisition
22 as items found in searching the catalogs in the item
23 master to prove infringement of Claim 26 because there
24 is no such requirement in any element of Claim 26.
25 And we would disagree with that statement.

1 I think both parties know that that change
2 has been made so it no longer can punch out, put on
3 the same requisition a punchout search and an item
4 master search. Everybody agrees that can no longer be
5 done and it used to be something that could be done.
6 And they're saying that that's, in a sense,
7 irrelevant, and we're saying it's essential. And the
8 relevance or lack thereof of that change depends
9 primarily on what was contended and proved at the
10 merits trial when Dr. Weaver, in particular, testified
11 and did his demonstrations, we would allege.

12 And TiVo tells us that in defending this
13 case, I believe that Lawson is entitled as a matter of
14 due process to understand what ePlus says that it
15 contended and proved at the first trial and to
16 understand that so we can rebut it.

17 They are now saying they didn't rely on that
18 evidence at trial. We think they did. And we feel
19 like that really crystallizes this case for Your
20 Honor. We don't actually have a dispute about what
21 the change is. We have a dispute about the
22 significance of it, and that dispute ultimately lies
23 in the record from the first trial. And I don't know
24 how we are to bring that to Your Honor's attention
25 because the hearing on April 2, 3 and 4 seems like a

1 very bad place us to be telling Your Honor what was
2 said at the last trial.

3 TiVo would have suggested to us that that be
4 done pretrial. We have had seven letters between us
5 to the Court on this subject. We have consistently
6 requested in those letters that plaintiff be required
7 to tell us what they believe was contended and proved,
8 and we be required to respond to that. And we would
9 once again ask the Court to enact that sort of
10 requirement before we go to trial because we think
11 that crystallizes the dispute about the significance
12 of the undisputed changes that were indeed made to
13 punchout and to Configurations 3 and 5.

14 MR. STRAPP: Your Honor, this is Michael
15 Strapp. Can I respond to that, please?

16 THE COURT: Sure.

17 MR. STRAPP: Our understanding of TiVo and
18 all of the cases that have applied TiVo, the district
19 courts that have had contempt hearings post-TiVo, is
20 that TiVo does not require on a contempt hearing to
21 reopen the trial record, pore through the transcript,
22 try to decipher the black box that was the jury room
23 and make out what the verdict was.

24 In fact, no case post-TiVo has so held as
25 Lawson has suggested TiVo should be interpreted. And

1 we set this all out in extensive letter briefing
2 several months ago to Your Honor.

3 In fact, there is one case that we cited in
4 our opening brief, and that will also be featured in
5 the reply brief that we will be filing tomorrow, on
6 the 8th, called "Arlington Industries," in which this
7 issue was squarely presented to a District Court.

8 The question was whether or not a party who
9 was contending that it had made certain modifications
10 to an infringing product should be permitted to even
11 present evidence regarding those changes if the claim
12 that was at issue in that case didn't require the
13 feature that had been changed.

14 And what the District Court said in this case
15 in Arlington Industries was, it granted a motion in
16 limine to exclude that evidence because it said,
17 quoting from TiVo, that if a modification was made to
18 a "randomly chosen feature," that can't be the basis
19 for a finding of more than colorable differences here.

20 And what that means -- and here is probably
21 the crux of the disagreement, is that you don't
22 measure whether or not a change is relevant to a prior
23 finding of infringement based on poring through a
24 thousand-page trial record, but rather you look to the
25 element of the claim that was found to infringe to

1 make that benchmark determination.

2 And if you find that the element of the claim
3 doesn't require the feature or the functionality that
4 was modified or removed, then as a matter of law there
5 cannot be a finding of more than colorable
6 differences.

7 That's the inquiry that TiVo directs courts
8 to undertake, and that's how TiVo has been interpreted
9 by every court that has looked at TiVo after that
10 decision was handed down by the Federal Circuit in
11 2011. Not a single court has interpreted it the way
12 Lawson urges Your Honor to interpret it.

13 So we think that the contempt proceeding
14 should go forward as planned. There doesn't need to
15 be some sort of prehearing issue on this front. It
16 will be teed up in the briefs that have already been
17 filed and in the reply briefs that will be filed, but
18 we think it's simply a matter of comparing the
19 elements of Claim 26, the modification that has been
20 made by Lawson, and determining whether or not that
21 modification is relevant to any of the claim elements
22 in Claim 26.

23 MR. THOMASCH: Your Honor, that does
24 crystallize the fact that we are seeing this
25 completely differently, we are reading the law

1 differently, and we're going into trial with a
2 fundamental misunderstanding of what the trial is.

3 TiVo talks about "contended" and "proved at
4 trial." The Arlington case cited by Mr. Strapp did
5 not involve a trial. There was never a trial in
6 Arlington. There was a confession of judgment. It
7 was a totally different situation. Here there was a
8 trial. The trial left an extensive verdict. The
9 verdict does delineate between different
10 configurations and different product claims.

11 TiVo tells you, you must sort through that
12 and you don't look at the claims. TiVo rejected the
13 analysis of colorability that is derived from the
14 infringement analysis of the claims. The first stage
15 is a product-to-product comparison, and here is where
16 our product changed fundamentally, and everyone knows
17 it. There's no dispute about it. And what changed
18 was the functionality that was demonstrated to the
19 jury as the proof of infringement. And we believe
20 that if we could get past this legal issue of what
21 TiVo says, we could have judgment as a matter of law.

22 THE COURT: Mr. Thomasch, what you really
23 want to do is go into the mind of the jury and see
24 what the jury decided and that isn't what TiVo
25 requires. And Mr. Strapp's got it, I think in my

1 judgment, about right. This is rehashing a whole
2 bunch of communication that went on with eight or nine
3 letters that I read through before I issued the order
4 of January 24.

5 So I think we'll proceed as indicated and
6 without having a dive into the mind of the jury in the
7 other trial. So I think that will take care of that.
8 I hope it does.

9 In any event, how many witnesses do you
10 expect to call, Mr. Strapp?

11 MR. STRAPP: Your Honor, we anticipate
12 calling -- Dr. Weaver will be our one technical
13 expert. And we also have a remedies damages expert.
14 That's Dr. Ugone. Those are our two experts.

15 In terms of fact witnesses, we don't have any
16 ePlus witnesses we intend to call, but we do intend to
17 call adversely in our case Mr. Christopherson,
18 Mr. Lohkamp and Mr. Hanson.

19 THE COURT: Are you playing part of
20 Mr. Hager's deposition if he doesn't come or call him
21 in?

22 MR. MERRITT: We would like to call him and
23 have him there in person. If not, we will go to plans
24 B or C, as previously discussed.

25 THE COURT: Well, I hope we can be here in

1 person.

2 MR. MERRITT: Well, we would certainly prefer
3 that and we understand that Mr. Thomasch would as
4 well.

5 THE COURT: Yes. How many witnesses are you
6 going to put on, Mr. Thomasch?

7 MR. THOMASCH: Your Honor, actually, I do not
8 have that at the moment. We certainly have a
9 technical expert and we have a damages expert. We
10 will be questioning the witnesses that are in our
11 employ that are called during the plaintiff's case.
12 We may have some additional witnesses that will be on
13 our witness list at that time. We have not yet made a
14 final decision.

15 THE COURT: But how many in order of
16 magnitude are you thinking you're going to draft from?

17 MR. THOMASCH: I would expect that with
18 the -- counting the three that are our employees that
19 are going to be called by the plaintiff, plus our two,
20 that's five witnesses, and then I would expect that
21 order of magnitude is zero to four more.

22 THE COURT: Excuse me a minute. Are you all
23 hearing any clicking on your line?

24 MR. THOMASCH: Yes, Your Honor, but it has
25 not prevented us from being able to hear what's being

1 said.

2 THE COURT: Do you know what it is?

3 MR. THOMASCH: No, Your Honor.

4 THE COURT: Has it been on your line before
5 or do you think it's our on our line? We've had some
6 problems with our phone.

7 MR. THOMASCH: We have not had problems, but
8 I'm in a conference room, and I can't say that I've
9 used this phone enough to be certain, Your Honor.

10 THE COURT: Well, it may be. I don't know.
11 I can hear it.

12 MR. THOMASCH: Sounds like a creaky rocking
13 chair, Your Honor, but no one here is in a rocking
14 chair.

15 THE COURT: Yeah. It's a little early for
16 that for you all.

17 The schedule here, how many -- let me go at
18 it this way: How many exhibits do you all anticipate
19 filing for ePlus and for Lawson, respectively?
20 Mr. Strapp?

21 MR. STRAPP: Your Honor, we haven't finalized
22 our list of exhibits. We do intend to provide a list
23 of exhibits to Lawson next week. We're in the process
24 of trying to narrow that list down to a manageable
25 size, but we don't anticipate it's going to be a large

1 volume.

2 THE COURT: This is the 7th of March and
3 you're proposing to do that on the 12th.

4 MR. STRAPP: Right.

5 THE COURT: How about you, Mr. Thomasch?

6 MR. THOMASCH: Your Honor, I'm sorry. We
7 will do it after Mr. Strapp, and I also don't have
8 that number, but I am hoping it will be considerably
9 fewer than what was originally in the case and trying
10 to make a list of ones that will actually come into
11 evidence.

12 THE COURT: The 11th is Monday. I'm trying
13 to see whether you-all don't need to advance this
14 schedule a little bit because I don't get until the
15 28th of March a resolution of what it is that has been
16 agreed to and then we start the hearing on the 2nd of
17 April. That's pretty --

18 MR. THOMASCH: Your Honor, what day would you
19 like them?

20 THE COURT: I'd like to have all of this
21 concluded by the 20th of March. I'd like to have all
22 of those exchanges finished by the 20th of March.
23 Could you all tender another order that has that in
24 there or call in here and just tell Mr. Beerbower what
25 dates you want to put in for March 12, 15, 21, 25 and

1 28, and he can pencil them in, and I'll initial them
2 and just sign this order?

3 MR. THOMASCH: Yes, Your Honor.

4 THE COURT: All right. You-all call
5 Mr. Beerbower and tell him that. You-all can talk
6 about it after this call.

7 Now, is that everything for you-all?

8 MR. MERRITT: Judge, with regard to the
9 Monday 11:30 deadline on Mr. Hager, was the Court
10 contemplating a conference call or just giving you
11 notice by then of what the resolution is?

12 THE COURT: I'd like to have a call so we can
13 resolve everything if there is anything to resolve.

14 MR. MERRITT: Judge, let me ask you, since
15 Mr. Hager is separately represented, would you like us
16 to give Mr. Witthoefft notice of that so that we can
17 get Mr. Hager's definitive position at that time?

18 THE COURT: Absolutely.

19 MR. MERRITT: I will do that.

20 THE COURT: And he can sit in on the call if
21 he wants to. He's invited, but I can't order him to
22 be here.

23 All right. Is that it for you-all?

24 MR. THOMASCH: Your Honor, it's Mr. Thomasch
25 for Lawson. Only to note, Your Honor, that yesterday

1 we made a motion pursuant to Rule 60(b)(5). That
2 motion by the normal briefing schedule will be fully
3 briefed before the time for the hearing, and we would
4 request oral argument on the motion at the Court's
5 earliest convenience.

6 THE COURT: Well, I have to tell you that
7 back in early February, I was preparing to convene a
8 conference call with you-all to ask you about the
9 proceedings that the Federal Circuit required which
10 said to consider how to modify the injunction or
11 whatever the order of the Court said.

12 Then I learned of Mr. Robertson's untimely
13 and sad passing. And the other thing was I didn't
14 think I had any authority to do any of that until the
15 mandate of the Federal Circuit was issued. And then
16 on the 11th, three days later, the mandate was issued,
17 but you-all all had said put everything on hold until
18 you get things sorted out and can talk about where you
19 want to go and go where you want to go.

20 So I regard that I need to deal with the
21 question of the injunction and the modification of it
22 and would like to set a schedule for that. But, now,
23 do you view that this is a substitute for that, Mr.
24 Thomasch? I haven't read your motion. I know you
25 have filed one, but I haven't read it.

1 MR. THOMASCH: Well, it does make a formal
2 motion to request that the Court address the Federal
3 Circuit mandate and presents our position as to what
4 the proper resolution of addressing it would be. Your
5 Honor did require, you'll recall, earlier this year
6 for the parties to submit position statements with
7 respect to the effect of the Federal Circuit decision
8 on the injunction as well as on the contempt
9 proceeding as separate issues.

10 At that time, however, the mandate had not
11 issued. We put our position in to Your Honor. Then
12 later the mandate issued, and we wanted to make sure
13 that we had made a formal motion and not simply relied
14 on having briefed our preferences, but actually --

15 THE COURT: Well, it all got held up because
16 of the untimely death of Mr. Robertson. You took the
17 position in your letter or position statement that the
18 Court didn't have jurisdiction to deal with the
19 injunction until the mandate issued. And I think
20 that's right. All of it was up before the Federal
21 Circuit.

22 So you say you filed this under Rule 60?

23 MR. THOMASCH: Yes. In other words, we have
24 made a motion, a formal motion, to dissolve or modify
25 the injunction, and Rule 60(b)(5), of course, allows

1 that when the underpinning of an order has been
2 reversed or vacated or where changed circumstances
3 would make the prospective continuation of an order
4 unfair. And we believe that both of those grounds
5 apply here.

6 So now that the mandate was issued 3 1/2
7 weeks ago, we wanted to simply formally request that
8 the Court address that. We believe that two things
9 are central. One is that in order to determine
10 whether there should be an injunction going forward,
11 it is incumbent on the Court to reevaluate the
12 four-factor test under eBay. And we believe that the
13 existing record would not support the continuation of
14 an injunction. If the Court were to have a new --

15 THE COURT: I mean, do you demonstrate why
16 you think that in this paper that you filed?

17 MR. THOMASCH: Yes, we do, Your Honor.

18 THE COURT: Okay. All right.

19 MR. THOMASCH: We incorporated by reference
20 our prior briefing because we didn't want to bog the
21 Court down, but it is essentially a self-contained
22 document, Your Honor, that says why we believe we're
23 entitled to the relief.

24 THE COURT: Then you have to file a reply
25 here for ePlus. So you-all need to -- when are you

1 going to do that?

2 MR. STRAPP: Your Honor, I believe that our
3 opposition is due on March 18. That's when we
4 intended to file.

5 THE COURT: All right. So you're filing it
6 in accord with the rules.

7 MR. MERRITT: Yes, sir.

8 THE COURT: All right. That's fine. I'll
9 hear the rely then and we'll go from there.

10 All right. That helps me. One of the
11 reasons I wanted to talk to you-all today was how do
12 we proceed from here as respects satisfying the order
13 of the Circuit now that the mandate has been issued.

14 All right. I'll await being informed on that
15 and that takes care of everything, I think. So thank
16 you all for being available and I'll talk to you on
17 Monday.

18 MR. MERRITT: Thank you, Your Honor.

19 MR. THOMASCH: Thank you, Your Honor.

20 THE COURT: Bye-bye.

21 (The proceedings were adjourned at 4:35 PM.)

22 I, Diane J. Daffron, certify that the
23 foregoing is a correct transcript of the record of
24 proceedings in the above-entitled matter.

25

DIANE J. DAFFRON, RPR, CCR _____ DATE.